

FILED

JUN - 3 1999

**CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. POPE,

Plaintiff,

v.

SOUTHERN PACIFIC
TRANSPORTATION CO., UNION
PACIFIC RAILROAD,

Defendants.

CIV-S-97-0226 DFL GGH

MEMORANDUM OF OPINION AND
ORDER

Plaintiff Michael Pope brings this action against Southern Pacific Transportation Co. and Union Pacific Railroad (collectively referred to as "Southern Pacific"), asserting a claim under the Federal Employer's Liability Act ("FELA"). Pope moves for summary judgment.

I.

Pope was a conductor and brakeman for Southern Pacific, working primarily out of Redding, California. (Pope Depo. at 24:5-25:9.) On the night of March 17, 1994, he was working with a crew switching train tracks running to local industries between Redding and Anderson, California. (Id. at 123:2-4.) The crew had finished its work and was heading back to Redding when Pope was called upon to "throw" the inside crossover switch from the main

1 line at Anderson. (Id. at 123:9-11; 125:1-3.) Pope contends that
2 he injured his back when he pulled on the switch. He further
3 alleges that the switch was not properly maintained and violated
4 applicable federal safety regulations.

5 Pope filed this action on February 11, 1997, and now moves
6 for summary judgment on the ground that Southern Pacific's
7 violation of safety regulations constitutes negligence per se.

8 II.

9 Pope makes three principal arguments. First, he urges the
10 court not to consider the declarations submitted by the defendants
11 in opposition to his motion for summary judgment. Second, he
12 maintains that there is no triable issue of fact as to whether he
13 was injured as a result of Southern Pacific's negligence.
14 Finally, he argues that his FELA action is timely as a matter of
15 law.

16 A.

17 In opposition to Pope's motion, Southern Pacific relies on
18 the declarations of three witnesses on the issue of track
19 maintenance and safety: Trent Allen, Ken Mahon, and Charles
20 Heimerdinger. Pope asserts, however, that the declarants offer
21 expert opinions. Because Southern Pacific failed to timely
22 identify the declarants as expert witnesses in accordance with the
23 court's scheduling order under Federal Rule of Civil Procedure 16,
24 Pope argues that the court should not consider the declarations.

25 The court's Pre-trial Scheduling Order provides:
26

1 [D]efendant is ordered to disclose the name and address of
2 any and all expert witnesses that it proposes to call at
trial not later than December 11, 1998.

3 Failure of a party to comply with the disclosure schedule
4 as set forth above in all likelihood will preclude that
party from calling the expert witness at the time of trial.
5 An expert witness not appearing on the designation will not
be permitted to testify unless the party offering the
6 witness demonstrates: (a) that the necessity for the
witness could not have been reasonably anticipated at the
7 time the list was proffered; (b) that the court and
opposing counsel were promptly notified upon discovery of
8 the witness; and (c) that the witness was promptly made
available for deposition.

9 (March 30, 1998 Pre-trial Sched. Order.)

10 As Pope points out, Southern Pacific did not name Allen,
11 Mahon, and Heimerdinger as experts in their Expert Witness
12 Disclosure and Amended Expert Witness Disclosure; indeed,
13 Southern Pacific appears not to have named any experts on the
14 issue of track maintenance and safety. (Pl.'s Exs. 15, 16.) The
15 declarations made by these three witnesses, however, include
16 expert testimony as to the condition and safety of the track on
17 which Pope was injured. Allen concludes based upon his
18 "familiar[ity] with the applicable Federal regulations concerning
19 construction and maintenance of railroad track structures and
20 rail," and a review of photographs, published diagrams, and Union
21 Pacific manuals, that the track was in compliance with federal
22 law. (Allen Decl. ¶¶ 4-8.) He offers no testimony based upon his
23 direct observations or perceptions. Similarly, Heimerdinger
24 offers no percipient witness testimony, but merely concludes based
25 upon his familiarity with Southern Pacific's rules and regulations
26

1 and his experience as an engineer and claims representative that
2 when a switch "became hard to throw and could not be operated
3 without reasonable force, the operator of the switch was to stop
4 and get help throwing the switch." (Id. ¶¶ 4-5.) And while
5 Mahon states that he has "personal knowledge and familiarity with
6 the track and the switch that are the subject of this litigation,"
7 (Mahon Decl. ¶ 3), he goes on to conclude that the track at issue
8 was in compliance with federal regulations based upon his
9 "familiar[ity] with the Federal regulations" and his experience
10 "work[ing] with Federal track inspectors," (id. ¶ 5-6).¹

11 The record suggests that Southern Pacific should have
12 anticipated the need to call these witnesses for the purpose of
13 offering expert testimony regarding the safety and condition of
14 the track at issue here. Southern Pacific cannot claim it lacked
15 notice that the condition of the track would be at issue in this
16 case. Pope alleged in his complaint that "the switch was not
17 properly inspected, maintained, aligned and repaired," (Compl. ¶
18 8), and in his expert disclosure named "an expert in the areas of
19 railroad safety issues, operating practices and procedures and FRA
20 regulations," (Pl.'s Expert Disc. ¶ 8). Moreover, although Pope
21

22 ¹ Pope also contends that Allen and Mahon gave expert
23 testimony by classifying the track on which Pope was injured under
24 Federal Railroad regulations. (Allen Decl. ¶ 6; Mahon Decl. ¶ 5.)
25 Under the applicable regulations, however, the class of a stretch
26 of railroad track apparently depends upon the speed limit on the
track. See 49 C.F.R. § 213.9(a). Because it does not take
specialized knowledge to infer the class of track from personal
knowledge of the track's speed limit, Allen's classification of
the track is probably not expert testimony.

1 offered only boilerplate objections in response to form
2 interrogatories that clearly and specifically asked him to "state
3 the rule[s] and regulation[s] upon which his FELA claim was
4 based," (Def.'s First Set of Interrogs. at 7), his responses to
5 the defendant's special interrogatories were more forthcoming.
6 Pope stated, for example, that "[t]he switch was not in good
7 alignment, was not level so that the switch points would ride
8 evenly across each switch plate, and was not sufficiently
9 lubricated." (Pl.'s Resp. to Def.'s First Set of Special
10 Interrogs. at 8.) Even if this response did not specifically list
11 the particular regulations at issue, surely Southern Pacific knew
12 that the handful of regulations pertaining to switches were
13 implicated by such a response. In sum, Southern Pacific cannot
14 now ascribe its failure to list track and switch experts in its
15 expert disclosure to some default or deception by plaintiff.

16 For these reasons, the court declines to consider the
17 affidavits of Allen, Heimerdinger, and Mahon in ruling on Pope's
18 motion for summary judgment.

19 B.

20 Pope argues that Southern Pacific's failure adequately to
21 maintain the switch that injured him violates federal railroad
22 regulations and constitutes negligence per se. Pope further
23 asserts that there is no triable issue of fact as to contributory
24 negligence and causation.

25 1. Negligence per se
26

1 Under FELA, "conduct is deemed negligent per se if it
2 violates a statute or regulation and if it 'contributes in fact to
3 the death or injury in suit, without regard to whether the injury
4 flowing from the breach was the injury the statute sought to
5 prevent." Morant v. Long Island R.R., 66 F.3d 518, 522 (2d Cir.
6 1995) (citation and internal quotations omitted); see also Ries v.
7 National R.R. Passenger Corp., 960 F.2d 1156, 1159 (9th Cir. 1992)
8 ("It is well-settled that the FELA requires a finding of
9 negligence per se when there has been a violation of a safety
10 statute specifically aimed at the railroad industry."). Pope
11 contends that Southern Pacific violated two federal regulations
12 governing track safety as a matter of law: 49 C.F.R. § 213.133(a)
13 and 49 C.F.R. § 213.135.²

14 49 C.F.R. § 213.133(a) provides that "[i]n turnouts and
15 track crossings, the fastenings shall be intact and maintained so
16 as to keep the components securely in place. Also, each switch,
17 frog, and guard rail shall be kept free of obstructions that may
18 interfere with the passage of wheels." Pope has submitted a
19 declaration and deposition testimony from his designated expert
20 witness on track maintenance and safety issues, Lupe Vallejo.

22 ² Pope also maintains that Southern Pacific violated 49
23 C.F.R. § 213.133(b), which provides in relevant part that
24 "[c]lasses 3 through 5 track shall be equipped with rail anchoring
25 through and on each side of track crossings and turnouts, to
26 restrain rail movement affect the position of switch points and
frogs." The court need not address this issue, however, because
Pope has established that Southern Pacific was negligent per se
based upon its violations of 49 C.F.R. § 213.133(a) and 49 C.F.R.
§ 213.135(e).

1 According to Vallejo's declaration and curriculum vitae, he has
2 extensive knowledge of the federal regulations governing railroad
3 track construction and has experience working as a track foreman,
4 an inspector for the Federal Railroad Administration, and a
5 consultant on issues of railroad safety and operations. (Vallejo
6 Decl. ¶¶ 2, 4, 7, 8; Vallejo Depo. Ex. 2.) Vallejo determined
7 based upon a review of photographs and written statements that the
8 switch that injured Pope was not securely fastened within the
9 meaning of this regulation. (Vallejo Decl. ¶ 10.) Referring to a
10 photograph exhibit, Vallejo explained:

11 [T]here's rail movement going on. That's why you get this
12 type of defect when the brace is hitting the rail.

13 * * *

14 [I]f you have this kind of a problem, it's because your
15 switch for one thing is not adjusted properly, and also
16 that your rail needs anchors on there to stop the movement.
17 So you have two options. You can either put the rail
anchors on or keep adjusting this switch so it doesn't
bind. This will cause binding of the switch and make it
hard to move back and forth.

18 (Vallejo Depo. at 48:19-49:24.) According to Vallejo, Southern
19 Pacific failed to pursue either remedy, opting instead for a
20 "quick repair". (Id. at 50:13-52:9.) The only contrary evidence
21 submitted by Southern Pacific is Allen's declaration, which the
22 court has declined to consider. Because the evidence submitted by
23 Pope is uncontroverted, the only reasonable inference from the
24 record is that Southern Pacific failed to ensure that the switch
25 components were "maintained so as to keep the components securely
26

1 in place."

2 49 C.F.R. § 213.135(e) provides that "[e]ach switch stand and
3 connecting rod shall be securely fastened and operable without
4 excessive lost motion." Pope relies on Vallejo's conclusion that
5 the switch at issue here "had insufficient anchorage to restrain
6 rail movement and had missing rail anchors such that the switch
7 was not maintained so as to keep the component parts securely in
8 place." (Vallejo Decl. ¶ 10.) Vallejo further explained his
9 finding of a 213.135(e) violation in his deposition testimony:

10 Counsel:

11 Okay. Now, is there anything in -- before I move on here,
12 is 49 C.F.R. 213.135 listed on Exhibit 3 here, what -- is
13 there any particular picture that matches the conditions
14 that you are referring to in that code section?

15 Vallejo:

16 There again, we're talking about this connecting rod. The
17 connecting rod is coming here to the number two rod. And
18 the way that everything looks right here and looking at the
19 -- where this handle was bent before tells me that it's --
20 it wasn't secure, securely fastened, everything, to make it
21 operable so that you could just get it and in one motion
22 where you move your switch points over.

23 (Vallejo Depo. at 56:16-57:3.) Because the only contrary evidence
24 submitted by Southern Pacific is Allen's inadmissible expert
25 declaration, a jury could only reasonably conclude based on this
26 record that the switch stand and connecting rod were not securely
fastened in accordance with the regulation.

Summary judgment is therefore granted for Pope with respect
to Southern Pacific's violation of 49 C.F.R. § 213.133(a) and 49
C.F.R. § 135.

1 2. Contributory Negligence

2 Under FELA, "no . . . employee who may be injured or killed
3 shall be held to have been guilty of contributory negligence in
4 any case where the violation by such common carrier of any statute
5 enacted for the safety of employees contributed to the injury or
6 death of such employee." 45 U.S.C. § 53; see also Ries, 960 F.2d
7 at 1159 ("If a statutory duty is violated by the employer, the
8 employee will recover all of her damages under the FELA even
9 though the employee is contributorily negligent."). The federal
10 courts have interpreted this provision to embrace violations of
11 safety regulations as well as statutory violations. See Morant v.
12 Long Island R.R., 66 F.3d 518, 522 (2d Cir. 1995) ("Under FELA,
13 conduct is deemed negligent per se if it violates a statute or
14 regulation and if it contributes in fact to the death or injury in
15 suit, without regard to whether the injury flowing from the breach
16 was the injury the statute sought to prevent.") (citation and
17 internal quotations omitted). Because Pope has established that
18 Southern Pacific violated federal railroad regulations as a matter
19 of law, summary judgment is granted for Pope on Southern Pacific's
20 contributory negligence defense.

21 3. Causation

22 Pope contends that there is no genuine issue of material fact
23 as to whether his injury was caused by his attempt to throw the
24 stubborn switch on March 17, 1994.

25 "It is well established that FELA does not provide worker's
26

1 compensation, but that liability is based upon negligence having a
2 causal connection with the injury." Oglesby v. Southern Pac.
3 Transp. Co., 6 F.3d 603, 606 (9th Cir. 1993). A plaintiff need
4 not show that the defendant's conduct was the proximate cause of
5 his injury to be entitled to an award under FELA; "[l]iability
6 may be found where employer negligence played any part, even the
7 slightest, in producing the injury." Armstrong v. Burlington
8 North. R.R. Co., 139 F.3d 1277, 1278 (9th Cir. 1998).

9 Pope claims that he immediately felt a sharp pain in his
10 lower back when he tried to pull the switch, (Pope Depo. at 35:21-
11 37:13, 143:2-5), and that he did not have serious back problems
12 prior to this incident, (id. at 35:21-24). Moreover, Pope has
13 submitted expert testimony concluding that this incident was a
14 cause of his injury, even if the "cumulative trauma" of Pope's
15 "switch throws over his railroad career" was also a factor.
16 (Dischler Depo. at 65:15-23.)

17 Southern Pacific counters with expert testimony that "the
18 forces and postures used in throwing the switch in question could
19 not have caused the severe degenerative condition that Mr. Pope
20 was diagnosed with following the March 17, 1994 incident."
21 (Pizialli Decl. ¶ 10.) Southern Pacific's expert explains that
22 "[e]ven assuming that Mr. Pope indeed did not experience any
23 symptoms of his diagnosed degenerative condition until the March
24 17, 1994 rail switch event, it does not automatically follow that
25 the March 17, 1994 event was the cause of the injury or condition
26

1 complained of." (Id. ¶ 12.) This testimony does not, however,
2 raise a triable issue of fact as to as to whether Pope's failed
3 attempt to pull the stubborn switch "played any part, even the
4 slightest, in producing the injury," Armstrong, 139 F.3d at 1278.
5 Even if Pope indeed had a degenerative back condition and the
6 March 17, 1994 incident was not the sole cause of his
7 ultimate injury, that incident was indisputably a but-for cause of
8 the injury, which is all FELA requires.

9 Nor has Southern Pacific raised a triable issue of fact as to
10 causation by submitting evidence indicating that Pope was
11 contributorily negligent. "Proof that the employee's own
12 negligence was the sole cause of his or her injury is a valid
13 defense because it eliminates the possibility that the regulatory
14 violation contributed in whole or in part to the injury." Walden
15 v. Illinois Central Gulf R.R., 975 F.2d 361, 364 (7th Cir. 1992)
16 (emphasis added); see also Beimert v. Burlington North., Inc., 726
17 F.2d 412, 414 (8th Cir. 1984) (explaining that "[i]f the
18 plaintiff's negligence was the sole cause, then the violation of
19 the [applicable federal regulation] could not have contributed in
20 whole or in part to the injury"); Maldonado v. Missouri Pac. Ry.
21 Co., 798 F.2d 764, 767 (5th Cir. 1986) ("Of course, because the
22 [statutory] violation [giving rise to FELA liability] must be a
23 causative factor in the plaintiff's injuries, the railroad in
24 appropriate circumstances may raise a sole cause defense."). But
25 a jury could not reasonably conclude based upon the record that
26 Pope's conduct was the only cause of his injury; Pope has

1 established that his attempt to throw the stubborn switch at
2 Anderson was a but-for cause of his injury, and that the switch
3 was difficult to throw because Southern Pacific failed properly to
4 maintain it.

5 Pope is entitled to summary judgment on the issue of
6 causation.

7 C.

8 A FELA action must be "commenced within three years from the
9 day the cause of action accrued." 45 U.S.C. § 56. Pope was
10 injured on March 17, 1994, and brought this action on February 11,
11 1997, well within the three year limitations period.

12 Southern Pacific maintains that a triable issue of fact
13 exists as to whether Pope's action is time-barred because there is
14 evidence in the record that Pope's injury was caused by events
15 occurring outside the limitations period. But Pope's FELA action
16 is not predicated on the prior events cited by the defendant; his
17 suit is based solely on the March 17, 1994 incident.
18 Accordingly, his claim is not time-barred

19 III.

20 Pope's motion for summary judgment is GRANTED on the issue
21 of Southern Pacific's liability under FELA.

22 IT IS SO ORDERED.

23 Dated: 1 June 1998.

24 David F. Levi

25 DAVID F. LEVI

26 United States District Judge

United States District Court
for the
Eastern District of California
June 3, 1999

gm

* * CERTIFICATE OF SERVICE * *

2:97-cv-00226

Pope

v.

Southern Pacific

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on June 3, 1999, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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